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IN THE
COURT OF APPEALS OF INDIANA

FREDDIE RAY McDONALD, JR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 67A01-0009-CR-314
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE PUTNAM CIRCUIT COURT
The Honorable Diana J. LaViolette, Judge
Cause No. 67C01-0001-CF-6

May 23, 2001

MEMORANDUM DECISION – NOT FOR PUBLICATION

BROOK, Judge

[1] After the briefing of this case, Deputy Attorney General Nandita G. Shepherd filed an appearance or substitution of appearance for the State.

Case Summary

Appellant-defendant Freddie Ray McDonald, Jr. ("McDonald") filed an interlocutory appeal from the trial court's denial of his motion to suppress. We reverse.[2]

Issues

McDonald presents two issues for our review, which we restate as follows:

I. Whether the trial court erred in determining that the search of McDonald was lawful as a proper protective search to ensure officer safety; and

II. Whether the trial court erred in denying McDonald's motion to suppress his statements.

Facts and Procedural History

On January 11, 2000, Renee Marsteller ("Marsteller"), Putnam County juvenile chief probation officer, and Indiana state troopers Donna Elam ("Elam"), Dujuan McFadden ("McFadden"), and Mike Rogers visited the home of a ten-year-old juvenile probationer for a routine check. As the officers approached the house, they observed someone look out the front window, turn, and run toward the back of the house. The three officers checked the back of the house to ensure that no one was attempting to leave, while Marsteller went to the front door and was admitted into the home. Inside the home, she found the probationer, his mother, Amy Trueblood ("Trueblood"), and his grandfather. Trueblood indicated that no one else was in the house.

After confirming that no one had left the house, the officers returned to the front of the house and went inside. Upon entering the home, McFadden smelled burnt marijuana.

[2] We held oral argument of this case at Bloomington North High School on May 2, 2001. We express our gratitude to the faculty, staff, and students of Bloomington North High School for the hospitality they extended to the court.

McFadden went into the kitchen to look for the person who had been standing at the window and found McDonald hiding by the refrigerator. McFadden drew his gun, ordered McDonald to his feet, and handcuffed him. McFadden told McDonald that he was not under arrest, but that he was handcuffed for the officer's safety. McFadden asked McDonald whether he had any weapons, which McDonald denied. McDonald did not threaten the officer; rather, he was cooperative and responded to all McFadden's requests. While McDonald was handcuffed, McFadden performed a pat-down search for weapons and felt a hard object. McFadden removed the object, which was a blowtorch pipe used to smoke drugs. McFadden also found more than 30 grams of marijuana, more than 30 grams of methamphetamine, several bags of a white powdery substance, a razor blade, and over $200 cash in McDonald's jacket. At that point, McFadden advised McDonald of his *Miranda* rights and questioned McDonald, and McDonald admitted that the drugs belonged to him.

After obtaining consent from the homeowner, the officers called in a K-9 unit to search the home. The K-9 unit found marijuana and drug paraphernalia in Trueblood's bedroom. McDonald confessed that all of the drugs and paraphernalia found were his. The State charged McDonald with possession of more than 30 grams of marijuana, a Class D felony; possession of a controlled substance, methamphetamine, a Class D felony; and dealing in a controlled substance, a Class B felony. McDonald filed a motion to suppress in which he contended that the search of his person[3] was not incident to a

[3] McDonald did not seek to suppress the marijuana found in the bedroom, as he conceded he was without standing to do so. *See Peterson v. State*, 674 N.E.2d 528, 534 (Ind. 1996) (stating that defendant

valid arrest and that the evidence and statements obtained as a result of the arrest violated his state and federal constitutional rights to be free from unreasonable searches and seizures. Specifically, McDonald alleged that the search was conducted without a warrant and without probable cause. On June 7, 2000, the trial court held a hearing on McDonald's motion and thereafter denied the motion. The trial court concluded that the search was valid as a protective search to ensure officer safety. On August 1, 2000, the trial court certified its order for interlocutory appeal. On October 2, 2000, we accepted jurisdiction of this appeal pursuant to Indiana Appellate Rule 4(B)(6).

Discussion and Decision

Standard of Review

The admissibility of evidence is within the sound discretion of the trial court and will not be disturbed absent a showing that the trial court abused its discretion. *Johnson v. State*, 710 N.E.2d 925, 927 (Ind. Ct. App. 1999). Upon review of a trial court's ruling on a motion to suppress evidence, we will examine the evidence most favorable to the ruling, together with any uncontradicted evidence. *Callahan v. State*, 719 N.E.2d 430, 434 (Ind. Ct. App. 1999). We will neither reweigh the evidence nor judge witness credibility. *Johnson*, 710 N.E.2d at 927.

I. Search

McDonald contends that the trial court erred in denying his motion to suppress evidence based on its finding that the search of his person was proper for the purpose of

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did not have standing to challenge search of bedroom where he failed to show ownership, control, possession or interest in the premises searched), *cert. denied*, 522 U.S. 1078 (1998).

ensuring officer safety. Specifically, McDonald argues, as he did in his motion to suppress, that he was under arrest at the time of the search and that the arrest was illegal because the officers did not have probable cause. Therefore, he argues, the ensuing search of his person and the seizure of the drugs and paraphernalia violated his federal and state rights to be secure from unreasonable searches and seizures. *See* U.S. CONST. amend. IV; IND. CONST. art. 1, § 11. McDonald also asserts that there was no evidence that he posed a threat to the officers and that McFadden had no basis to perform a pat-down search for officer safety.

The State counters that McDonald was not under arrest at the time of the search and that the search performed was legitimate because it was necessary to ensure officer safety. *See Burkett v. State*, 691 N.E.2d 1241, 1244 (Ind. Ct. App. 1998) (noting that the Fourth Amendment "permits a police officer to approach a person for purposes of investigating possible criminal behavior without probable cause to make an arrest, and to execute a reasonable search of the person for weapons for the officer's own protection"), *trans. denied*; *Terry v. Ohio*, 392 U.S. 1 (1968). The State contends that McFadden had a reasonable fear his safety was threatened based on McDonald running from the window upon seeing police, hiding behind a refrigerator, and wearing a bulky jacket in which he could conceal weapons. The trial court denied McDonald's motion to suppress based on its conclusion that the search was necessary for officer safety. We first address McDonald's argument because if we conclude that he was under arrest prior to the search, the *Terry* analysis would not apply.

> The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." This guarantee provides that searches and seizures which take place without prior judicial authorization are *per se* unreasonable pursuant to the Fourth Amendment, subject only to a few, narrow exceptions.

Conwell v. State, 714 N.E.2d 764, 766 (Ind. Ct. App. 1999) (citations omitted). An exception to the warrant requirement exists for a search performed incident to arrest. *Campbell v. State*, 734 N.E.2d 248, 251 (Ind. Ct. App. 2000). Thus, we must determine whether McDonald was under arrest at the time of the search. "Indiana Code section 35-33-1-5 defines an arrest as 'taking of a person into custody, that he may be held to answer for a crime.'" *Gibson v. State*, 733 N.E.2d 945, 953 (Ind. Ct. App. 2000). "An arrest occurs when an officer 'interrupts the freedom of the accused and restricts his liberty of movement.'" *Williams v. State*, 630 N.E.2d 221, 224 (Ind. Ct. App. 1994) (quoting *Armstrong v. State*, 429 N.E.2d 647, 651 (Ind. 1982)).

When Officer McFadden found McDonald in the kitchen, he drew his gun, pointed it at McDonald, and ordered McDonald to stand with his hands behind his head. McFadden then handcuffed McDonald and subsequently searched him. McDonald was clearly under arrest at the time of the search, as his freedom was interrupted and his liberty of movement was restricted. *See Williams*, 630 N.E.2d at 224. "Holding a person at gunpoint certainly restrains his liberty of movement and is a clear example of arrest." *Taylor v. State*, 464 N.E.2d 1333, 1335 (Ind. Ct. App. 1984). Furthermore, as noted, McDonald was handcuffed. *See Sears v. State*, 668 N.E.2d 662, 667 (Ind. 1996) (noting that defendant who was handcuffed and placed in back of patrol car was under arrest).

Officer McFadden's statement to McDonald that he was not under arrest despite being handcuffed and held at gunpoint does not negate the fact that McDonald's liberty was restricted. We find the State's argument that McDonald was not under arrest at the time of the search untenable under Indiana law.

However, "[i]t is well established that the police can search without a warrant if it is incident to a valid arrest." *Sears*, 668 N.E.2d at 666. Thus, we must determine whether the arrest was lawful. A warrantless arrest is lawful if the arresting officer has probable cause to believe that the *person being arrested* has committed or is in the process of committing an offense. *Jackson v. State*, 597 N.E.2d 950, 956-57 (Ind. 1992), *cert. denied*, 507 U.S. 976 (1993). Probable cause exists "where at the time of the arrest the officer has knowledge of facts and circumstances which warrant a man of reasonable caution to believe a suspect has committed the criminal act in question." *Gibson*, 733 N.E.2d at 953.

The facts known to the officers at the time of McDonald's arrest are as follows: (1) McDonald allegedly fled from the window upon seeing the officers arrive at the home; (2) the officers smelled burnt marijuana upon entering the home; and (3) McDonald was found hiding beside the refrigerator. Clearly, the officers had a reasonable suspicion that a crime had been committed based on the odor of burnt marijuana in the home and McDonald's actions. *See Reeves v. State*, 666 N.E.2d 933, 934 (Ind. Ct. App. 1996) ("'Reasonable suspicion entails some minimum level of objective justification for making a stop . . . .' Based on the totality of the circumstances,

the detaining officer must have a particularized and objective basis for suspecting the particular person stopped of engaging in criminal activity." (citations omitted)).

However, based on our review of the facts known to the officers at the time, we cannot say that *probable cause* existed to support an arrest for possession of marijuana and a search incident thereto. Both Officer Elam and Officer McFadden testified that they did not smell marijuana on McDonald. At the time of the arrest, the officers did not have probable cause to believe that *McDonald*, rather than the other individuals in the home, had committed a crime. *See Jackson*, 597 N.E.2d at 956-57. Consequently, we conclude that the arrest of McDonald was unlawful. "An unlawful arrest cannot be the foundation of a lawful search. Moreover, evidence which is the product of an unlawful detention or an illegal arrest is inadmissible." *Gibson*, 733 N.E.2d at 953. In fact, the State conceded at oral argument that if we were to conclude that McDonald was under arrest at the time of the search, as we indeed have, that the search was invalid due to lack of probable cause for the arrest and that the evidence should therefore be suppressed. Accordingly, the evidence obtained as a result of the search incident to McDonald's arrest must be excluded under the "fruit of the poisonous tree" doctrine. *See Jackson v. State*, 669 N.E.2d 744, 750 (Ind. Ct. App. 1996).

II. Admissibility of Statements

Second, McDonald contends that his statements should have been suppressed because he was not informed of his *Miranda* rights prior to questioning. The State responds that there was no illegal arrest and that the statements were voluntarily made and are therefore admissible.

As we concluded *supra*, McDonald's arrest was unlawful. Statements obtained through custodial interrogation after an illegal arrest are generally inadmissible. *See Brown v. State*, 503 N.E.2d 405, 407 (Ind. 1987). However, an illegal arrest does not automatically render all inculpatory statements and actions inadmissible.[4] *Haverstick v. State*, 648 N.E.2d 399, 400 (Ind. Ct. App. 1995). Rather, we must consider "'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" *Snellgrove v. State*, 569 N.E.2d 337, 341 (Ind. 1991) (quoting *Wong Sun v. United States*, 371 U.S. 471, 488 (1963)). In determining whether the statements have been purged of the primary taint, we look to such factors as whether *Miranda* warnings were given prior to the statement, the temporal proximity of the arrest and the confession, the presence of intervening circumstances, and the purpose and flagrancy of the official misconduct. *See Clark v. State*, 401 N.E.2d 773, 776 (Ind. Ct. App. 1980). The giving of *Miranda* warnings alone does not render an incriminating statement admissible. *Id.* at 775-76. "In order for the causal chain, between the illegal arrest and the statements made subsequent thereto, to be broken[,] *Wong Sun* requires not merely that the statement meet the Fifth Amendment standard of voluntariness but that it be 'sufficiently an act of free will to purge the primary taint.'" *Id*. at 776.

In the present case, McFadden asked McDonald if he had any weapons after handcuffing him and before performing the search. After finding drugs and

[4] The State conceded at oral argument that the statements obtained after the search would likewise be inadmissible if we were to conclude that McDonald had been unlawfully arrested.

paraphernalia on McDonald's person, McFadden advised McDonald of his *Miranda* rights. McFadden then questioned McDonald about the drugs found in his jacket, and McDonald admitted that they were his. Although McDonald was given *Miranda* warnings, we conclude that his statements were not purged of the primary taint of the illegal arrest. The only intervening event between the illegal arrest and McDonald's admission was the giving of *Miranda* warnings. This factor alone is not sufficient to establish that McDonald's statements were an act of free will. *See Clark*, 401 N.E.2d at 775-76; *Morris v. State*, 272 Ind. 467, 471, 399 N.E.2d 740, 742 (1980) ("[E]ven if a confession is voluntary under the Fifth Amendment and *Miranda* and its progeny, that confession must be suppressed if it is the product of an unlawful arrest or detention" where the State has failed to prove that the confession had been purged of the primary taint of the illegal arrest.).

After their search of McDonald, the officers obtained consent from the owner of the home to search the home. A K-9 unit found marijuana in a back bedroom. Although it is unclear from the record, McDonald apparently admitted that the drugs found in the bedroom were also his.[5] We conclude that this statement is likewise inadmissible under

[5] The record indicates that when McDonald was initially questioned about the drugs found on his person, the officers had not yet found the marijuana in the bedroom. In response to the initial questioning, McDonald admitted that the drugs found on his person belonged to him. At the motion to suppress hearing, Officer McFadden was questioned by the State as follows:

> Q. All right. And did you discuss with him about any drugs?
> A. In terms of what, discussing drugs? I asked him who these belonged to uh he confessed to all – he said all this is mine um, I mean he basically just said all of it was his.
> Q. Okay and was this also after you had found other drugs in the house?
> A. Me dealing with him was before we found the rest of the drugs in the house.
> Q. Okay. But he said what he had on his person was he [*sic*], correct?

the fruit of the poisonous tree doctrine. The record does not reveal any significant intervening circumstances between the arrest and the statement. Approximately two hours elapsed between McDonald's arrest and the search of the home. McDonald was detained at the home until the K-9 search was completed. Although McDonald was advised of his *Miranda* rights, we conclude that the *Miranda* warnings were not sufficient to purge the statements of the primary taint of the illegal arrest. *See Clark*, 404 N.E.2d at 775-76; *but cf. Snellgrove*, 569 N.E.2d at 342 (finding, in addition to the lack of purposeful conduct by the police, that where defendant was read *Miranda* warnings three times before confessing, had signed a form acknowledging that he understood his rights, and waived his *Miranda* rights, confession had been purged of primary taint). Considering the circumstances in their entirety, we conclude that McDonald's statements were not made as an act of free will and were not purged of the taint of the illegal arrest. Consequently, the statements are inadmissible under the "fruit of the poisonous tree" doctrine. We reverse the trial court's denial of McDonald's motion to suppress the evidence and statements obtained as a result of the illegal arrest and search.

Reversed.

A. Correct.
Q. And did you go ahead and search him and search the rest of the house later . . .
A. Later.
Q. Okay, was he still there?
A. He was still there.
Q. And did you discuss with him about any of the other drugs that were found?
A. Uh, I don't remember really discussing about the other drugs we found but I think at one point, like I said he, even the drugs that were found on him he admitted to, these were mine, all of them were his.
Q. He took the responsibility for the drugs that were found, is that correct?
A. Right.

Record at 64-65.

BAKER, J., and NAJAM, J., concur.